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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 VAXIION THERAPEUTICS, INC.,) Civil No. 07CV00280 IEG(RBB)
12)
13 Plaintiff,) ORDER RE EXPERT DESIGNATIONS
14) AND REPORTS [DOC. NO. 77]
15 v.)
16 FOLEY & LARDNER, LLP, and DOES)
1 through 20, inclusive,)
Defendants.)
_____)

17 On June 24, 2008, Plaintiff Vaxiion Therapeutics, Inc.
18 (Vaxiion"), filed an Ex Parte Application for Clarification Re:
19 Expert Designations and Reporting [doc. no. 77]. Defendant Foley &
20 Lardner LLP ("Foley") filed its Opposition to Plaintiff's Ex Parte
21 Application the next day, June 25, 2008 [doc. no. 78]. Neither the
22 Application nor the Opposition contains any citations to supporting
23 caselaw.

24 In Vaxiion's Application, Plaintiff seeks an order that "non-
25 retained experts need not provide reports." (Ex Parte App. 4.)
26 Alternatively, it requests that the Court identify which of
27 Vaxiion's non-retained experts must provide a report. (Id.)
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1 Vaxiion states that pursuant to Rule 26(a)(2) of the Federal
2 Rules of Civil Procedure, it identified the following nine non-
3 retained experts: (1) Roger Sabbadini, Vaxiion Pharmaceuticals,
4 (2) Matt Giacalone, Vaxiion Pharmaceuticals, (3) Scott Pancoast,
5 Lpath Pharmaceuticals, (4) Neil Berkley, Mpex Pharmaceuticals, (5)
6 Mark Surber, Aires Pharmaceuticals, (6) Stanley Malogy, Lpath
7 Pharmaceuticals, (7) Kathleen McGuire, Vaxiion Pharmaceuticals, (8)
8 William Gerhart, Versus Pharmaceuticals, and (9) Michael Rondelli,
9 San Diego State Foundation. (Id. at 1-2.) Plaintiff did not
10 provide expert reports for any of the nine non-retained experts.
11 (Id. at 2.) It only submitted reports for "retained experts" in
12 reliance on the provisions of Rule 26(a)(2)(B) of the Federal Rules
13 of Civil Procedure. (Ex Parte App. 3.) Vaxiion reads the rule too
14 narrowly.

15 Federal Rule of Civil Procedure 26(a)(2) requires the
16 disclosure of expert witnesses prior to trial. The rule states:

17 (A) *In General.* In addition to the disclosures required
18 by Rule 26(a)(1), a party must disclose to the other
19 parties the identity of any witness it may use at
trial to present evidence under Federal Rule of
Evidence 702, 703, or 705.

20 (B) *Written Report.* Unless otherwise stipulated or
21 ordered by the court, this disclosure must be
22 accompanied by a written report - prepared and
23 signed by the witness - if the witness is one
retained or specially employed to provide expert
testimony in the case or one whose duties as the
party's employee regularly involve giving expert
testimony.

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25 Fed. R. Civ. P. 26(a)(2)(A)-(B). The Federal Rules of Evidence
26 referred to in Rule 26(a)(2)(A) relate to testimony by experts in
27 general (Rule 702), the basis of expert opinions (Rule 703), and
28 the disclosure of facts or data underlying expert opinions (Rule

1 705). The written expert report must include the following: (1) a
2 statement of all opinions the witness will express and the basis
3 for the opinions; (2) the data considered by the witness in forming
4 the opinions; (3) any exhibits used to support the opinions; (4)
5 the witness's qualifications, including a list of all publications
6 authored in the preceding ten years; (5) a list of all cases in the
7 last four years in which the witness gave expert testimony; and (6)
8 the amount of compensation received by the witness for their study
9 and testimony. Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi).

10 Rule 26(a)(2) identifies two distinct groups of experts --
11 those who are "retained" to provide expert testimony at trial and
12 those who are not. Sprague v. Liberty Mut. Ins., 177 F.R.D. 78, 81
13 (D.N.H. 1998). These two groups are differently situated, and
14 accordingly, they are treated differently under the Rule.

15 One district court has defined a category of "percipient
16 experts" as "persons who, because of their expertise, have rendered
17 expert opinions in the normal course of their work duties or
18 observations pertinent to the issues in the case," whereas
19 "retained experts" are "persons specifically designated by a party
20 to be a testifying expert for the purposes of litigation." Vines
21 v. United States, 2008 U.S. Dist. LEXIS 23681, at *13-14 (E.D. Cal.
22 Mar. 25, 2008). Witnesses serving in the role of retained experts
23 are often provided with facts or opinions from outside sources,
24 such as a party's attorney, which form part of the basis of their
25 opinion testimony. See Sullivan v. Glock, Inc., 175 F.R.D. 487,
26 501 (D. Md. 1997).

27 "[W]here a witness will testify as to information acquired not
28 'in preparation for trial but rather because he was an actor or

1 viewer with respect to transactions or occurrences that are part of
2 the subject matter of the lawsuit,' that witness need not be
3 disclosed as an expert." Zarecki v. Nat'l R.R. Passenger Corp.,
4 914 F. Supp. 1566, 1573 (N.D. Ill. 1996) (quoting Patel v. Gayes,
5 984 F.2d 214, 217 (7th Cir. 1993)). "[A] party need not identify a
6 witness as an expert so long as the witness played a personal role
7 in the unfolding of the events at issue and the anticipated
8 questioning seeks only to elicit the witness's knowledge of those
9 events." Gomez v. Rivera Rodriguez, 344 F.3d 103, 113-14 (1st Cir.
10 2003) (citing Patel, 984 F.2d at 217-18). For example, "treating
11 physicians testifying only to the care and treatment afforded to a
12 party were intended to be excluded from the requirements of Fed. R.
13 Civ. P. 26(a)(2)(B)." Wreath v. United States, 161 F.R.D. 448, 449
14 D. Kan. 1995).

15 Similarly, in Matsuura v. E.I. du Pont de Nemours & Co., 2007
16 U.S. Dist. LEXIS 7891, at *16 (D. Haw. Feb. 2, 2007), the court was
17 presented with fourteen "percipient expert witnesses" who were
18 experts in the fields of law or science, but they were "involved in
19 the underlying litigation or were eyewitnesses to certain
20 scientific studies" related to the case, rather than being retained
21 for the purpose of giving expert testimony at trial. The court
22 analogized their positions to those of treating physicians who use
23 their expertise in medicine to treat and diagnose patients, and who
24 are allowed to testify at trial without giving expert reports. Id.
25 The witnesses were permitted to testify about their observations
26 based on personal knowledge, but they could not give opinion
27 testimony based on information they acquired from other sources.
28 Id. at *17.

1 Judge William Hayes weighed in on this issue in 350 W.A. LLC
2 v. Chubb Group of Ins., 2007 U.S. Dist. LEXIS 89881, at *40 (S.D.
3 Cal. Dec. 5, 2007). In that case, the defendant identified
4 eighteen percipient experts it intended to call to testify at
5 trial, but who did not provide expert reports. The court found
6 that the experts were properly identified and reports were not
7 necessary because they were retained "months or years before the
8 litigation in this case began for the purposes of investigating
9 Plaintiff's original insurance claim." Id. at *36-37. Because the
10 experts were employed by the defendant to determine the merit of
11 the plaintiff's insurance claims, and not for the purpose of
12 testifying at trial, they were not "retained experts" from who
13 expert reports and disclosures were required. Id. at *37-41.

14 Whether an expert report is required for each of Vaxiion's
15 nine "non-retained experts" requires individual evaluations. The
16 Court must look at the circumstances of each witness and the
17 substance of the testimony, not merely formulaic titles. See Gomez
18 v. Rivera Rodriguez, 344 F.3d at 113. ("[T]he triggering mechanism
19 for application of Rule 26's expert witness requirements is not the
20 status of the witness, but, rather, the essence of the proffered
21 testimony."). Proposed testimony from a percipient witness, who
22 happens to have scientific, technical, or other specialized
23 knowledge, differs from the testimony of retained experts who have
24 been hired to provide expert opinions based on information provided
25 to them by trial counsel. See Sullivan, 175 F.R.D. at 501.
26 Whether the witness has been "retained" is not the dividing line
27 for deciding from whom a report is required.

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1 If the proposed testimony of a non-retained expert witness
2 identified pursuant to Rule 26(a)(2)(A) will exceed the scope of
3 the individual's percipient knowledge and ventures into more
4 general expert testimony, a report will be required. See, e.g.,
5 Zarecki, 914 F. Supp. at 1573 (excluding part of treating
6 physician's testimony that went beyond his personal observations
7 and into his opinions on causation and foreseeability not derived
8 solely from his treatment of plaintiff); Wreath v. United States,
9 161 F.R.D. at 450 (stating that when a physician testifies "only to
10 the care and treatment of his/her patient, the physician is not to
11 be considered a specially retained expert, notwithstanding that the
12 physician may give testimony pursuant to Rules of Evidence 702,
13 703, and 705[]"). If the witnesses only provide testimony related
14 to the actions they took and things they directly learned, they are
15 not considered specially-retained experts who are required to
16 provide reports. See Wreath, 161 F.R.D. at 450.

17 The Court's Case Management Order for this case provides, in
18 part, as follows:

19 The parties must identify any person who may be used to
20 present evidence pursuant to Rules 702, 703, or 705 of the
21 Federal Rules of Evidence. This requirement is not limited to
22 retained experts. The designations shall comply with Rule
23 26(a)(2) of the Federal Rules of Civil Procedure and be
24 accompanied by a written report prepared and signed by
25 each witness, including in-house or other witnesses providing
26 expert testimony.

27 (Case Management Order 2 (emphasis added).) By its provisions, the
28 reporting requirement is not limited to specially retained or in-
house experts, as Plaintiff suggests. (Ex Parte App. 3.) Vaxiion
asserts that the Court's Case Management Order does not provide it

1 with sufficient guidance to determine whether a witness is an "in-
2 house expert" for whom a report should be prepared. (Id.)

3 Regardless of the label attached to the witness, if Plaintiff
4 desires to elicit expert testimony from its nine non-retained
5 experts that goes beyond their personal knowledge or beyond the
6 time period of their personal involvement, expert reports will be
7 required. "If the witness's opinion strays beyond the boundaries
8 described, the court will have the power to exclude it." Garcia v.
9 City of Springfield Police Dep't, 230 F.R.D. 247, 250 (D. Mass.
10 2005); see also Elgas v. Colorado Belle Corp., 179 F.R.D. 296, 299
11 (D. Nev. 1998) (citing Sullivan, 175 F.R.D. at 503) (stating that
12 if a party tries to introduce expert testimony that was not
13 properly disclosed under Rule 26(a)(2)(B), the proper remedy would
14 be exclusion of the evidence under Rules 37(a)(3) and 37(c)(1)).

15 Vaxiion has not provided the Court with sufficient facts to
16 enable it to determine whether the Plaintiff intends to elicit no
17 more than "percipient-witness" testimony from the nine individuals
18 who may have specialized knowledge or whether Plaintiff will
19 attempt to obtain their opinions based on (1) information
20 subsequently provided by others, (2) events to which the witness
21 was not a participant, or (3) other variables which demand pretrial
22 disclosure in the form of expert-witness reports. Accordingly, the
23 Court will neither grant the Plaintiff's request for an order that
24 it be excused from the requirement to provide expert reports for
25 non-retained "experts" nor grant the Defendant's request that the
26 Court strike the nine non-retained witnesses from Vaxiion's expert
27 designations.

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1 In light of the guidelines set forth, if Plaintiff determines
2 that expert reports should be submitted for the nine non-retained
3 witnesses, they must be served on or before July 24, 2008. If any
4 submitted report creates a need for a rebuttal report, it or they
5 may be submitted on or before August 14, 2008. Plaintiff and
6 Defendant are granted leave to depose any expert witness for whom
7 an expert report has been submitted pursuant to this order. The
8 depositions shall be completed on or before August 29, 2008.

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10 IT IS SO ORDERED.

11
12 July 2, 2008

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14 Ruben B. Brooks
15 United States Magistrate Judge
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